Supreme Court, U.S
FILED
JUL 19 1994
OFFICE OF THE CLERK

(4)

NO. 93-2021

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ALABAMA,

PETITIONER - APPELLEE,

V.

CHARLES HANSBROUGH,

RESPONDENT - APPELLANT.

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[28 U.S.C. §2254 PROCEEDINGS]

# REPLY BRIEF TO THE BRIEF IN OPPOSITION

JAMES H. EVANS
ALABAMA ATTORNEY GENERAL

*JAMES B. PRUDE
ASSISTANT ALABAMA ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 252-7300

*ATTORNEY OF RECORD

17 pp

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| TABLE OF CONTENTS..... | i |
| TABLE OF CASES..... | ii |
| TABLE OF OTHER AUTHORITIES..... | ii |
| ARGUMENT IN REPLY TO BRIEF IN OPPOSITION..... | 1 |
| CONCLUSION..... | 13 |

## TABLE OF CASES


PAGE(S)

Federal Deposit Insurance Corp. v. Equitable Life Assurance Society of the United States, 289 Ala. 192, 266 So.2d 752 (1972)..... 6

Ford v. Georgia, 498 U.S. 411 (1991)..... 9

Patterson v. State, 549 So.2d 635 (Ala. Cr. App. 1989)..... 10

Wilson v. Wilson, 298 So.2d 616, 53 Ala. App. 194 (1973)..... 6


## TABLE OF OTHER AUTHORITIES


PAGE(S)

Alabama Rules of Appellate Procedure

Rule 4(b)(1)..... 7

Rule 42..... 4

## ARGUMENT IN REPLY TO BRIEF IN OPPOSITION

In its Brief in Opposition to the Petition for Writ of Certiorari, Respondent accuses the Petitioner of miscasting the issue and appellate holdings in this case. Respondent asserts that he attempted to give a second, distinct notice of appeal after the first appeal had been withdrawn, rather than attempting to "reinstate" his first appeal. Respondent asserts that the Petitioner misrepresents the state of procedural law in Alabama.

Respondent's brief underscores the difficulty of the issue involved in this case and why this issue should be heard. Under Alabama law, there is no procedural rule allowing a defendant to give a "second" notice of appeal after he has

voluntarily withdrawn his first notice of appeal. The question of whether he can give a "second" notice is simply a state law question which would not be reviewable in federal habeas corpus. Consequently, if any review on this case is to be given by this Court, the issue must involve a federal constitutional question.

The federal constitutional question presented in this petition is whether Respondent, as part of his due process rights, has a federal constitutional right to "re-instate" his voluntarily withdrawn notice of appeal. If there is no federal right to reinstate the appeal, then clearly he would not be entitled to federal habeas corpus relief simply because the State, acting under its own internal procedures, did not accept the

second notice of appeal after he had voluntarily withdrawn the first notice.

Respondent's own Brief in Opposition implicitly acknowledges that the question of whether a subsequent notice of appeal can be entered is a question of state law. It states:

> "The issue, rather, is whether his withdrawal of the oral notice of appeal, for reasons consistent with his prior position regarding representation by counsel, barred the Respondent from filing a subsequent notice of appeal as provided by state rules, absent clear law or rule to the contrary."
>
> [Brief in Opposition, pg. 4)

In no way does Respondent ever assert that he had a federal constitutional right to give a second notice of appeal or a right to reinstate his first notice.

Respondent carefully avoids asserting that he had a federal constitutional right

to give a second notice. However, he states that the State's refusal to accept the second notice was properly reversed in federal habeas because the "Alabama Court of Criminal Appeals' action in dismissing Respondent's appeal was not grounded on an adequate and independent state rule" [Respondent's Brief in Opposition, page 5]. Clearly, this assertion is erroneous because Respondent's motion to dismiss his appeal was dismissed by the Alabama Court pursuant to Rule 42, Alabama Rules of Appellate Procedure (See Appendix "C", Appendices to the Petition for Writ of Certiorari, page 36). There is no doubt that the state court followed its appellate rules in dismissing the appeal.

Respondent also asserts that Rule 42 which allows a voluntary dismissal of an appeal is silent on whether such a

dismissal is with or without prejudice. Petitioner agree that that proposition. However, whether the state court construes a voluntary dismissal to be one of prejudice is merely a state law question and the Respondent is not entitled to any federal habeas corpus review, let alone relief, on the question of whether the state court, acting under state law, correctly refused his second notice or refused a reinstatement of the first notice.

Respondent contends that Alabama does not have any appellate rule or case holding that a voluntary dismissal of a notice of appeal constitutes a bar to a subsequent appeal. While this is a correct statement, it ignores the fact that the Alabama Court of Criminal Appeals construes it to be a bar to a subsequent

appeal because it denied Respondent the right to give a subsequent notice of appeal. This is simply a state law question.

Respondent asserts that Alabama law does allow, in civil cases, a plaintiff to dismiss an appeal and then revive the appeal by giving a second notice within the time allowed by law, citing Federal Deposit Insurance Corp. v. Equitable Life Assurance Society of the United States, 289 Ala. 192, 266 So.2d 752 (1972), and Wilson v. Wilson, 298 So.2d 616, 53 Ala. App. 194 (1973). These cases are inapplicable to Respondent's case for two reasons: first, these cases were decided prior to the adoption of the Alabama Rules of Appellate Procedure, which became effective in 1975. The Rules do not

contain the right to bring a subsequent appeal.

Secondly, these cases allowed a subsequent appeal only because a valid notice of appeal was in effect when the subsequent appeal was brought and because the appeal had been dismissed by the Court for other reasons, not on a motion by the plaintiff.

In Respondent's case, his "second" notice of appeal was not timely because it was filed more than 42 days from the date of sentencing in violation of Rule 4(b)(1), Alabama Rules of Appellate Procedure. [Exhibit D, Appendices to the Petition, pages 37, 38]. The Alabama Court of Criminal Appeals' order stated that the second notice of appeal was "untimely". Furthermore, no notice of appeal was in effect at the time he sought

to enter his second notice because the first notice had been withdrawn. Thus, Respondent has no basis for his assertion that his subsequent notice of appeal was proper under Wilson.

Respondent is also mistaken in his claim that his second notice of appeal was timely because it was filed within forty-two (42) days form the date of the denial of his motion for a new trial. However, as the District Court held, the proper calculation for notice under the facts of this case, was forty-two (42) days from the date of sentencing. Hence, this second notice was long past the required 42 day limit, and therefore, untimely.

Respondent also asserts that the Court of Criminal Appeals' action in declining to accept the second or

subsequent notice of appeal was "completely without precedent" [Brief in Opposition, page 7]. There is nothing in the record or evidence to support this claim. Respondent failed to present, in any way, evidence that the Court of Criminal Appeals has allowed other defendants to dismiss an appeal and to either enter a second appeal or reinstate the dismissed appeal. One of the primary basis for this Writ of Certiorari asserted in the Petition is that the Eleventh Circuit erred in granting relief under the "firmly established and regularly followed requirement" of Ford v. Georgia, 498 U.S. 411 (1991), in that the Eleventh Circuit never found that the Alabama Court of Criminal Appeals allowed subsequent appeals in some cases and denied them in others. In fact, the Eleventh Circuit

could never have found such a fact because there is no evidence that the Alabama Court ever accepts "untimely" appeals such as Respondent's, since the time for filing a notice of appeal is jurisdictional. Patterson v. State, 549 So.2d 635 (Ala. Cr. App. 1989).

Respondents asserts that his dismissal of his appeal was not for tactical reasons but was simply done to avoid representation by unwanted counsel. [Brief in Opposition, page 7] However, this objective could have been achieved through less drastic measures. Respondent could simply have filed a motion to dismiss counsel and have counsel move to withdraw. In addition, Respondent could have filed a supplemental pro se brief on appeal if he had been disappointed with appointed counsel's brief. Contrary to

Respondent's assertion, Petitioner does not challenge the wisdom of his motion to withdraw the appeal; rather, Petitioner only asserts that by the withdrawal, he ran afoul of the state's appellate practice which did not allow subsequent notices of appeal.

Respondent contends that the state appellate rule did not apprise him that he could not enter a second appeal. The converse is also true. There is nothing in the Rule which led him to believe that he could file the subsequent notices.

In his concluding paragraph of his Opposition Brief, Respondent acknowledges the very reason why certiorari needs to be granted in this case:

> "In any event, neither the Alabama Court of Criminal Appeals nor Petitioners have cited any rule at all, consistently applied or

> otherwise, to support its contention."
>
> [Opposition Brief, pg. 8)

Since there is no "written" appellate rule or case decision, Respondent is not entitled to relief on the ground that the Alabama Court of Criminal Appeals denied him equal right or due process because it refused to accept a subsequent appeal. Furthermore, since the refusal to grant subsequent appeals is an "unwritten" rule, Respondent was not entitled to any relief under Ford v. Georgia, because he did not show that this rule was being "inconsistently applied" to allow other defendants to give subsequent notices while denying him the right to do so.

## CONCLUSION

This Petition for Writ of Certiorari presents a substantial issue for review because the resolution will fundamentally affect the right of all States to enforce procedural rules regarding the appellate process. If the Eleventh Circuit's judgement is allowed to stand, criminal defendants will have the ability to wreck havoc on the appellate process which would affect the State's ability to obtain finality of a conviction. Merely by giving a valid notice of appeal, a defendant would have an unrestricted right to dismiss and reinstate his appeal at his discretion, prolonging the length of the appellate process, which in turn would affect the ability of the State to retry him should the conviction be overturned on appeal. The ability of the State to

obtain finality through an orderly appellate process is central to its ability to punish criminal behavior.

Respectfully submitted,

JAMES H. EVANS
ATTORNEY GENERAL
BY-

James B. Prude

JAMES B. PRUDE
ASSISTANT ATTORNEY GENERAL

6520I